

# **EXHIBIT 5**



U.S. Department of Justice

Environment and Natural Resources Division

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EARTHJUSTICE  
LEGAL DEFENSE FUND

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Patti Goldman  
Earthjustice  
705 Second Avenue, Suite 203  
Seattle, WA 98104-1711

Re: Effects Determinations in Washington Toxics Coalition v. EPA, Case No. C01-0132C

Dear Patti:

We are writing in response to your letter of October 27, 2004 regarding EPA's plan to review and update, where appropriate, certain "may affect" determinations upon which EPA is currently consulting with NOAA Fisheries pursuant to a July 2, 2002 court order in Washington Toxics Coalition v. EPA.

Your letter expresses your view that EPA's proposed approach for continuing its efforts to complete these consultations "raises a compliance issue" with respect to that court order because you believe it constitutes an admission that EPA fell short in preparing adequate effects determinations. Further, you propose that the parties to that litigation develop a schedule for EPA to supplement its consultations with NOAA Fisheries. Finally, you suggest that EPA's review should extend not only to those pesticides upon which EPA is consulting with NOAA Fisheries, but should also include pesticides for which EPA made "no effect" determinations. We will respond to each of these points in turn.

First, EPA is in compliance with July 2, 2002 court order. Contrary to your suggestion, neither EPA nor NOAA Fisheries has made a determination that any of EPA's "may affect" determinations is "inadequate." Rather, as action agencies typically and appropriately do in the course of consultation with the Services, EPA has committed to determine whether additional information or analyses might serve to affect those effects determinations. As noted in EPA/OPP Office Director Jim Jones' letter to you of September 24, EPA continues to be engaged in productive consultation with NOAA Fisheries on these determinations and, with their endorsement, EPA is implementing its plan for completing its consultation obligations regarding these determinations as discussed in that letter.

Accordingly, since there is no basis for plaintiffs to allege that EPA has somehow violated the Court's order, there is no basis for plaintiffs to demand the parties develop a new schedule to remedy a violation as you seek. EPA and NOAA Fisheries are proceeding with consultations that, like all Section 7 consultations, involve evaluation, review, and where appropriate supplementation of the information prepared by the consulting agency. There is simply no legal basis, either under the statute or the Court's orders, for plaintiffs to demand a new consultation schedule as you seek.

Finally, with regard to the "no effect" determinations, as noted in the Jim Jones letter to you, EPA is not aware of information suggesting the need to conduct a review of those determinations. Absent such information, EPA does not believe that such an exercise would represent the best use of Agency and Service resources. EPA believes its focus should be on those pesticides and pesticide uses that the Agency has determined may affect – or possess the potential to affect – listed species and designated critical habitat. Indeed, in recent discussions with one of EPA's chartered Federal Advisory committees, the Pesticide Program Dialogue Committee, there was general agreement among the participants that the interests of species protection would be best served by focusing EPA and Service resources on pesticide uses that pose greater potential for risk to listed species and designated habitat. Again, however, as noted in the Jim Jones letter, EPA encourages you to submit any information you are aware of that EPA did not consider in making those determinations that you believe contradict those findings.

Please call me at 202-305-0213 if you have any questions or comments.

Sincerely,



Wayne D. Hettenbach, Trial Attorney  
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